

No. 39957-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

MOUNTAIN WEST CONSTRUCTION, LLC
Plaintiff/Respondent,

v.

JAMES ALAN, LLC, et. al.,
Defendant/Appellant,

BRIEF OF APPELLANT JAMES ALAN, LLC

Stephan E. Todd, WSBA # 12429
14319 15th Drive SE
Mill Creek, WA 98012
(425) 585-0274
Attorney for Appellant

TABLE OF CONTENTS

I.	Assignments of Error	1
	A. Assignments of Error	1
	B. Issues Pertaining to Assignments of Error	1
II.	STATEMENT OF FACTS	1
III.	ARGUMENT	4
	A. Summary Judgment Standards	4
	B. There was a genuine issue of material fact as to whether Don Poe was authorized to sign change orders.	5
IV.	CONCLUSION	6

TABLE OF AUTHORITIES

Table of Cases	Page
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).	4
<i>City of Spokane v. County of Spokane</i> , 158 Wn.2d 661, 671, 146 P.3d 893 (2006).	4
<i>Durias v. Boswell</i> , 58 Wn. App. 100, 791 P.2d 282 (1990).	5
<i>Grundy v. Thurston County</i> , 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). . .	4
<i>ITT Rayonier v. Puget Sound Freight Lines</i> , 44 Wn. 2d 368, 722 P.2d 1310	5
<i>Lilly v. Lynch</i> , 88 Wn. App. 306, 312, 945 P.2d 727 (1997).	4
 Court Rules	
CR 56(c).	3

I. ASSIGNMENT OF ERROR

A. Assignment of Error. The trial court erred by granting summary judgment on the amount of Respondent's materialmen's lien where there were genuine issues of material fact raised by the declarations on file.

B. Issues Relating to Assignment of Error. Whether summary judgment was appropriate where the declarations on file demonstrated the existence of genuine issues of material fact, and that Mountain West Construction was not entitled to judgment as a matter of law.

II. STATEMENT OF FACTS

A Procedural History. On May 7, 2009, Mountain West Construction, LLC ("MWC") filed a motion for summary judgment against appellant James Alan, LLC ("JA") to determine the amount of its claimed materialmen's lien. (CP 75-93). A hearing on the motion was held on June 12, 2009 and on July 17, 2009 the trial court issued its memorandum opinion granting in part and denying in part, MWC's motion. (CP 238-239). MWC then moved for reconsideration and on the trial court granted the motion for reconsideration and a judgment and decree of foreclosure was entered. (CP 290-294). JA appealed. (CP 295-302)

B. Facts. JA owns 18.2 acres of real property in Poulsbo, Washington which was being developed as the Cook Addition Plat (CP 450). JA acquired the property on June 12, 2007 from David Alan Development, LLC (CP 17). David Alan Development, LLC has entered into a contract with MWC in May, 2007 on MWC's contract form which contract expressly provided that "Work shall not commence until Mountain West Construction, LLC receive (sic) written confirmation of project funding from the fanatical (sic) institution." (CP 21-25). Project funding was not in place until June 12, 2007 when Sterling Savings Bank recorded its deed of trust. (CP 186). On June 7, 2007, MWC signed a new contract with JA for development of the Cook Addition project for a cost of \$2,440,977.22. (CP 191). The contract provided that the work under the contract would be substantially completed by October 31, 2007. MWC did not complete its work by October 31, 2007 (CP 187) despite being paid a total of \$2,196,879.00 with Sterling Savings Bank holding retainage in the amount of \$244,118.00. (CP 191).

On April 23, 2008, MWC filed a claim of lien in the amount of \$801,354.58 which included the retainage held by Sterling Savings with the balance consisting of approximately \$409,000.00 in so-called "change orders", interest, and improperly charged taxes. (CP 34)

Nearly all of the “change orders” on which MWC based its lien claim, were allegedly approved by Don Poe. MWC claimed that Don Poe was the project manager for the Cook Addition project and that he had authority to sign the change orders. (CP 95). JA disputed that Don Poe was a project manager and had any authority to sign change orders. (CP 189). Poe was hired as the Certified Erosion Control and Sediment Lead (CECSL) on the project and that Jim James was the project manager. (CP 189).

On or about December 21, 2007, MWC sent three change order forms to David Alan Development, denoted change orders 0703-01, 0703-2 and 0703-03. (CP 185, CP 192-194). MWC’s job number for the Cook Addition project was 0703CA. (CP 192). These change orders were titled Change Order and on MWC’s form. (CP 192-194). The so-called “change orders” allegedly signed by Don Poe were not on these same forms and were for the most part undated and were simply timesheets for work on the project. Exhibit B to the Declaration of Stephen Davis in Support of Motion for Summary Judgment (CP 94 -149). In January 2008, Don Poe allegedly signed “change orders” totaling over \$290,121.00 when Don Poe no longer did any work on the Cook Addition Plat. (CP 190) Mr. Poe had never been the project manager and had

been replaced as the CECSL in November 2007. (CP 188-189). Neither Mr. Poe or his company billed JA for any work on the Cook Addition project after December 2007 and the bill for December 2007 only included 4 hours or time which was incurred in meeting with the newly hired CECSL. (CP 188-189).

III. ARGUMENT

A. Summary Judgment Standards.

Summary judgment is not a substitute for trial. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). Summary judgment is only appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997). Based on these standards, summary judgment for Coleman was not appropriate.

An appellate court reviews summary judgment de novo, engaging in the same inquiry as the trial court and views the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

B. There was a genuine issue of material fact as to whether Don Poe was authorized to sign change orders.

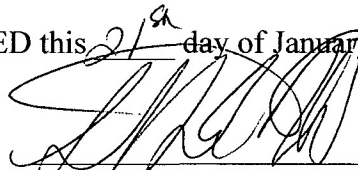
MWC claimed the Don Poe was a project manager on the Cook Addition project and was authorized to sign change orders. JA contended that Don Poe was not the project manager, that the hours he admittedly spent on the Cook Addition project were inconsistent with the amount of time that a project manager would spend on a project, that the "change-orders" were not change orders but simply time sheets for work that was not authorized and that Don Poe was not authorized to sign change orders in any event. . Moreover, some of the so-called "change orders" were "approved" by Don Poe at a time when he had no affiliation with the Cook Addition project.

Issues of agency and authority to bind a principal are factual issues. *ITT Rayonier v. Puget Sound Freight Lines*, 44 Wn. 2d 368, 722 P.2d 1310; *Durias v. Boswell*, 58 Wn. App. 100, 791 P.2d 282 (1990).

IV. CONCLUSION

There were genuine issues of material fact concerning the authority of Don Poe to approve change orders increasing the contract price for the development work on the Cook Addition project. It was error for the trial court to decide this matter on summary judgment. The judgment should be reversed and remanded for trial.

RESPECTFULLY SUBMITTED this ^{21st} day of January, 2010.



Stephan E. Todd WSBA#12429
Attorney for Appellants Milne